

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

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| In the matter of: |) | |
| United Motorcoach Association |) | CHARTER COMPLAINT |
| Complainant |) | 49 U.S.C. 5323(d) |
| v. | | |
| Pee-Dee Regional Transit Authority |) | CHARTER SERVICE DOCKET |
| Respondent |) | No. 2006-20 |

DECISION

SUMMARY

The United Motorcoach Association, hereinafter referred to as "complainant", filed this complaint with the Federal Transit Administration (FTA), alleging that the Pee-Dee Regional Transit Authority (PDRTD), hereinafter referred to as "respondent", has provided charter service in violation of the FTA charter regulation, 49 C.F.R Part 604. The complainant specifically alleges that respondent provided impermissible charter service by providing charter service for a school group to the Alabama Theatre in Myrtle Beach, South Carolina on December 12, 2006; that a willing and able private provider existed to provide the service; and that the willing and able private provider responded to respondent's notice of intent to provide the service in question indicating that it not only objected to the service but was willing and able to provide the service.

FTA accepted the complaint after determining that the complaint was not without obvious merit and on January 9, 2007, advised both parties to attempt to conciliate the dispute in accordance with 49 C.F.R. §604.15. By letter dated March 4, 2007, complainant advised that the conciliation efforts had failed; provided documentation in support; and reasserted its previous allegations. Complainant noted that although at one point it thought conciliation was possible, it cited a charter movement by respondent on February 16, 2007 which it believed demonstrated that respondent would continue to provide charter service although willing and able private providers existed which could have provided the charter. Complainant conceded that there may have been "technicalities" which allowed for the charter however and did not allege that the respondent was in violation of the charter rule by providing the charter service in this instance. By letter dated March 19, 2007, FTA directed both parties to proceed with the formal complaint process.

THE COMPLAINT

The United Motorcoach Association is an association representing private, for-profit charter operators engaged in the business of providing charter and other transportation services. By letter dated December 26, 2006, complainant filed this complaint with the FTA alleging that the services in question constitute prohibited charter service. Specifically, complainant alleges that the respondent provided impermissible charter services by providing charter service in violation of 49 C.F.R. §604.9 in spite of the fact that a willing and able private provider existed and had objected to the service ultimately provided by respondent. 49 C.F.R. §604.9 provides in part that if a recipient desires to provide any charter service using FTA equipment or facilities, the recipient must first determine whether a willing and able private provider exists. To the extent that at least one such private provider is in existence, the charter rule prohibits the recipient from providing charter service, unless permitted by one of the enumerated exceptions.

In support of its assertions, complainant provided copies of two letters dated October 25, 2004 and October 26, 2005 addressed to "Pee Dee Regional Transportation Authority" from Charles T. Young Jr., President, Capitol Tours. In both letters, Mr. Young opposed charter service proposed by respondent in the Chesterfield, Darlington, Dillon, Florence, Marion and Marlboro areas of South Carolina; asserted that it had the desire and physical capability to provide the intended service; stated that it had the requisite legal authority to provide the service in question; and maintained that it met all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.

THE RESPONSE

Complainant's complaint was forwarded to the respondent for response by letter dated March 19, 2007. On April 16, 2007, PDRTD filed its response. The respondent stated that the service complained of did not constitute a violation of 49 C.F.R. Part 604 in that the service in question was provided in accordance with 49 C.F.R. §604.9(b)(1) which

allows a recipient of FTA funds to provide charter service with FTA funded equipment to the extent that there are no willing and able private providers willing and able to provide the service.

The respondent acknowledged its responsibility under 49 C.F.R. §604.9(a) which requires that it first determine whether a willing and able private provider exists prior to providing the intended service. PDRTA noted in its response that as required by 49 C.F.R. §604.11, it yearly posts a notice in a publication of general distribution in its service area that it intends to engage in charter service unless "willing and able" private charter providers respond to the notice. PDRTA provided a copy of a notice of its intent to provide charter service within fifty-miles of its geographic service area which includes the counties of Chesterfield, Marlboro, Dillon, Marion, Florence and Darlington, South Carolina. The notice was published on November 9 and November 16, 2005 and was sworn and subscribed to by a Notary Public for and in the State of South Carolina. The notice stated that its purpose was to determine if there were any willing and able private providers interested in providing the proposed service and required a written response including written evidence in support within 30 days (December 15, 2005) of publication of the notice. The notice outlined the type of documentation required (a statement that the private provider have the desire and physical capability to provide the service and documentation demonstrating the private provider's requisite legal authority) and stated that a review of any responses received would be completed within 30 days of the deadline.

The respondent further maintained that it received no response to its notice of November 9 and November 16, 2005, and that it never received the letters from Capitol Tours provided in support of complainant's complaint as referenced above. PDRTA states that even if it had received the letter, that it was not responsive to the requirements of 49 C.F.R. §604.11 in that Capitol Tours is not within PDRTA's service area or within the 50 mile proposed charter service area and that the letter failed to attach copies of documents demonstrating the private provider's legal authority. The respondent concluded that it intended to continue to provide charter service to the extent permitted by state and federal regulations and that the service it provides was and is in accordance with those laws.

THE REBUTTAL

On April 24, 2007, complainant was advised by FTA that respondent's response to the complaint had been received and in accordance with 49 C.F.R. §604.15(d), was provided 30 days from receipt of this notice to provide a rebuttal. On July 4, 2007, complainant provided its rebuttal to FTA. In its rebuttal, complainant reasserted its previous allegations and urged FTA to obtain sworn testimony maintaining that FTA "could find matters of compelling interest not only to the Regional Administrator, but the U.S. Department of Justice".

DISCUSSION

The purpose of the complaint process set forth at 49 C.F.R. §604.15 is to allow interested parties, who believe that a recipient is in violation of the requirements of the charter rule,

to submit a written complaint to the FTA Regional Administrator outlining their complaint. Should the complaint be accepted, the complainant and respondent are required to provide written evidence in support of their positions. Upon a review of the written evidence, the Regional Administrator may decide to issue a decision on the evidence received, request additional information if he or she determines additional information is necessary, and/or hold an informal evidentiary hearing.

In this instance, written evidence was provided by both parties in the form of the complaint itself, letters and memorandums detailing the failed conciliation process, respondent's response to the complaint, and rebuttals filed by complainant. Upon conclusion of the complaint process, FTA asked respondent to provide additional information which had not previously been provided to FTA's satisfaction. FTA believes that sufficient time has been provided over the past nine months for both parties to submit documentation in support of their positions and that the investigation conducted by FTA was both comprehensive and complete. In addition, and upon request of the complainant, FTA granted complainant an extension until June 29, 2007 to file its final rebuttal. As such, we believe that additional time necessitated by conducting an informal evidentiary hearing and the receipt of sworn testimony would be unwarranted as ample opportunity has already been provided to present substantive evidence. An informal evidentiary hearing will therefore not be held as this decision is the prerogative of the Regional Administrator within his or her discretion pursuant to 49 C.F.R. §604.15(g).

A review of the complaint and an analysis of the facts and circumstances pertinent to the complaint follows.

EXCEPTIONS TO THE CHARTER RULE

The foundation of this complaint is whether the charter service conducted by respondent on December 12, 2006 constituted a violation of FTA's charter rule, specifically 49 C.F.R. §604.9 and §604.11. The first provision requires that a recipient desiring to provide charter service must first determine if a willing and able private provider exists to provide the service in question. If such a provider exists, the recipient is prohibited from providing charter service. The second provision sets forth the procedure by which the recipient makes this determination, including the publication of a notice stating and identifying its intent, and requesting responses from willing and able private providers demonstrating their willingness and legal capability to perform.

It is uncontested that PDRTA published a notice of intent to provide charter service on November 9 and November 16, 2005 in a publication of general distribution in its service area. It is also uncontested that the notice conformed to all procedural aspects of the notice provisions as set forth at 49 C.F.R. §604.11. The notice described the service the respondent intended to provide; the geographical area where the service would be provided; and requested documentation from interested private providers corroborating their interest and legal authority to provide the service.

The only issue in contention is whether the respondent received a response from a willing and able private provider which provided the information requested within the 30 day time period provided for in the notice. The complainant asserts that letters of interest were in fact provided in accordance with the notice and provided two letters from a willing and able private provider, Capitol Tours, in support thereof. The respondent firmly denies that it received the letters. Moreover, it argues that even if it had, neither letter would have been responsive in that Capitol Tours is not within PDRTA's service area or within the 50 mile proposed charter service area nor did the letters attach copies of documents demonstrating the entity's requisite legal authority.

On July 9, 2007, FTA posed several questions to the respondent including whether it had ever received the letters provided by complainant from Capitol Tours; whether it was its contention that a private provider must be located within the 50 mile charter service area proposed by respondent in order to be considered willing and able; and whether actual documentation of a private provider's legal authority must be provided in order to be considered responsive to the notice. FTA also requested that PDRTA indicate whether or not the public notice in question had been provided to the United Bus Owners of America and the American Bus Association. PDRTA responded that it received a letter from Capitol Tours in response to its Fall 2004 public notice but reiterated that it did not receive a letter in response to its Fall, 2005 notice, which was intended for calendar year 2006; that a private provider not located within PDRTA's service area nor within the 50 mile radius delineated in the charter notice should not be considered "willing and able"; that actual documentation of a private provider's legal authority must be provided in response to the charter notice in order to be considered responsive to the notice; and that the notice had been provided to the United Bus Owners of America and the American Bus Association.

FTA finds that respondent's contention that a private provider must be located within the 50 mile charter service area within which service is proposed in order to respond is without merit. 49 C.F.R. §604.11(b) merely states that the notice must be placed in a newspaper of general circulation within the proposed geographic charter service area and that copies of the notice must be sent to all private charter service operators in the service area, including any private charter service operator that requests notice in addition to the United Bus Owners of America and the American Bus Association. As stated in answer to "Question 2" of the "Charter Service Questions and Answers" published at 54 Fed. Reg. 42248 (1987), a copy of the notice must be sent to all private charter operators within the service area and to any private operator that requests it, as well as to the American Bus Association and the United Bus Owners of America, thereby ensuring that the notice will be delivered to the largest possible number of private operators. Clearly the intent of the rule is to provide the notice to as large an audience as possible to enable the private sector to signify its willingness to provide the service in question. It is apparent from the respondent's response to FTA's queries that copies of the notice were sent to the American Bus Association and the United Bus Owners of America as required by the rule. However, by limiting responses to private providers located within the 50 mile charter service area within which service is proposed renders the notice defective and in technical violation of the charter rule.

FTA agrees with respondent's contention, however, that the letters offered by the complainant from Capitol Tours objecting to the PDRTA's proposed charter service failed to provide documents which demonstrated the private provider's requisite legal capacity and authority. 49 C.F.R. §604.11(c)(5)(ii) clearly states that the notice of intent must require that the private charter operator provide "... A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service". The notice published by respondent clearly requires such documentation. The evidence submitted fails to demonstrate that such documentation was provided.

Most obvious, however, is that although complainant alleges that the letters from Capitol Tours were sent in objection to PDRTA's notice of intent to provide the charter service in question, neither were dated after the notice's publication dates of November 9 and November 16, 2005. The letters in question were dated October 25, 2004 and October 26, 2005 respectively. Clearly neither letter could be deemed responsive to respondent's publication of November 9 and 16, 2005 which required that "...Any private charter operator desiring to be considered willing and able should submit written evidence to prove that it is willing and able to the PDRTA at the address shown below by December 15, 2005." And although it might be argued that PDRTA should have known of the interest of Capitol Tours of providing the service in question, it adamantly argues that it did not receive the letters provided. The rule is clear that the notice must "...include a statement providing any private charter operator desiring to be considered willing and able with at least 30 days from the date of the notice to submit written evidence to prove that it is willing and able." See 49 C.F.R. §604.11(c)(3). The notice published by respondent conformed to this rule. The letters provided by complainant as evidence of a private provider's willingness to provide the service in response to this notice did not.

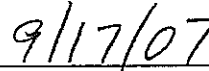
CONCLUSION

A review of the evidence submitted reveals that complainant failed to demonstrate that a willing and able private provider submitted evidence in support of its objection to the public hearing notice and proposed charter service in a timely manner as prescribed by the rule or that a private provider submitted documentation in support of its legal authority to provide such service. As such, FTA finds that the complainant failed to comply with the provisions of 49 C.F.R. §604.11 and the requirements of the public notice published by respondent. As such, the tenants of the complaint are without merit and the complaint is accordingly denied. We note, however, that respondent's failure to accept responses to the public notice from private transportation providers located beyond 50 miles of the respondent's charter service area in order to be considered willing and able is in violation of the charter rule. The respondent is therefore directed to adopt written procedures which correct this deficiency and provide to FTA for review and approval within 30 days of receipt of this letter.

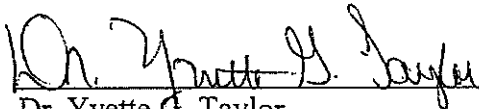
Because the complainant did not prevail on its complaint, an appeal may be taken to the Administrator of FTA within 10 days of receipt of this decision in accordance with 49 C.F.R. §604.19.



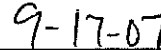
Paul T. Jensen
Regional Counsel



Date



Dr. Yvette G. Taylor
Regional Administrator



Date